U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 17 April 2006

Case No.: 2004-BLA-6228

In the Matter of:

DONNIE W. HARRISON
Claimant

v.

UNICORN MINING, INC.
Employer

AMERICAN INTERNATIONAL SOUTH CO.
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

APPEARANCES: Mark L. Ford, Esq.
For the Claimant

H. Brett Stonecipher, Esq.
For the Employer/Carrier

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER – DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq*. (the "Act"). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

Mr. Donnie W. Harrison, represented by counsel, appeared and testified at the formal hearing held December 14, 2005 in Harlan, Kentucky. I afforded both parties the opportunity to offer testimony, question witnesses and introduce evidence. Claimant submitted one exhibit at the hearing, and as a result, I gave Employer sixty days to submit a rebuttal. Thereafter, I closed

the record. I based the following Findings of Fact and Conclusions of Law upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. Although the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformity with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, EX and CX refer to the exhibits of the Director, Employer and Claimant, respectively.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Procedural History

Donnie W. Harrison ("Claimant") filed his first application for Federal Black Lung benefits on August 16, 1999. (DX 1-87). After reviewing the relevant evidence, the District Director denied the claim on December 1, 1999. (DX 1-41). Claimant then filed a request for modification and additional evidence. However, the District Director found that Claimant failed to prove a change in condition and denied the claim on January 2, 2001. (DX 1-4). Claimant did not appeal the decision and the claim was administratively closed. (DX 1-2). On May 8, 2002, Claimant filed the current subsequent claim. (DX 3). The claim was denied by the District Director on January 30, 2004. (DX 24). Claimant requested a formal hearing and the claim was transferred to the Office of Administrative Law Judges on May 5, 2004. (DX 26, 30).

Factual Background

Claimant was born on March 7, 1950. (DX 3). Claimant has a ninth grade education and is married to Sandra Short Harrison. (DX 3). Claimant claims to have worked seventeen and a half years in coal mine employment. (DX 3). He worked underground as a roof bolter. (Tr. 16). Claimant left the mines in 1998 due to a seizure disorder. (DX 3; Tr. 16-17). Claimant testified he suffers from shortness of breath and takes Albuterol. (Tr. 18-19). He testified at the December 14, 2005 hearing that he smoked cigarettes between 1967 through 1994. (Tr. 20-21). Claimant stated that Dr. Baker's finding of two or three packs of cigarettes per day was incorrect. (Tr. 20-21). He stated that he only smoked one to a little over one pack of cigarettes per day. Dr. Forehand's smoking determination supports Claimant's testimony. (DX 11). I find based on the evidence of record and Claimant's testimony that he smoked one pack of cigarettes per day between 1967 and 1992. Therefore, Claimant has a twenty-five pack year smoking history.

Current Contested Issues

The parties contest the following issues regarding this claim:

1. Whether Claimant's claim was timely filed;

2. Whether Claimant has pneumoconiosis as defined by the Act and the regulations;

3. Whether Claimant's pneumoconiosis, if present, arose out of coal mine employment;

4. Whether Claimant is totally disabled;

5. Whether Claimant's total disability, if present, is due to pneumoconiosis;

6. Whether the evidence establishes a material change in conditions per 20 C.F.R. § 725.309(c),(d).

Employer also contests other issues that are identified at line 18(b) on the list of issues. These issues are beyond the authority of an administrative law judge and are preserved for appeal.[1]

Dependency

Claimant alleges one dependent for the purposes of benefit augmentation, namely his wife, Sandra. (DX 3). They married on May 1, 1972. (DX 9). Claimant submitted the marriage certificate establishing the relationship with his wife and testified as to her dependency. (DX 9; Tr. 12). Accordingly, I find that Claimant has one dependent for the purposes of benefit augmentation.

Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. The District Director made a finding of 17.24 years in coal mine employment. (DX 24). Employer stipulated to seventeen years. (Tr. 10). The documentary evidence includes Claimant's Social Security earnings report and an employment questionnaire. (DX 5-8). The evidence of record supports the stipulation of seventeen years. (DX 3-8). Accordingly, based upon all the evidence in the record, I find that Claimant was a coal miner, as that term is defined by the Act and Regulations, for seventeen years. He last worked in the Nation's coal mines in 1998. (DX 3).

Timeliness

Under § 725.308(a), a claim of a living miner is timely filed if it is filed "within three years after a medical determination of total disability due to pneumoconiosis" has been communicated to the miner. Section 725.308(c) creates a rebuttable presumption that every claim for benefits is timely filed. This statute of limitations does not begin to run until a miner is actually diagnosed by a doctor, regardless of whether the miner believes he has the disease

[1] These issues involve the constitutionality of the Act and the regulations. Administrative Law Judges are precluded from ruling on the constitutionality of the Act, and therefore, these issues will not be ruled on herein but are preserved for appeal purposes.

earlier. *Tennessee Consolidated Coal Company v. Kirk*, 264 F.3d 602 (6th Cir. 2001). In addition, the court stated:

> The three-year limitations clock begins to tick the first time that a miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of a miner's claim or claims, and, pursuant to *Sharondale*, the clock may only be turned back if the miner returns to the mines after a denial of benefits. There is thus a distinction between premature claims that are unsupported by a medical determination, like Kirk's 1979, 1985, and 1988 claims, and those claims that come with or acquire such support. Medically supported claims, even if ultimately deemed "premature" because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period. [Footnote omitted.] Three years after such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course, he may continue to pursue pending claims.

Id.

In an unpublished opinion arising in the Sixth Circuit, *Furgerson v. Jericol Mining, Inc.*, BRB Nos. 03-0798 BLA and 03-0798 BLA-A (Sept. 20, 2004) (unpub.), the Benefits Review Board held that *Kirk*, 264 F.3d 602 is controlling and directed the administrative law judge in that case to "determine if [the physician] rendered a well-reasoned diagnosis of total disability due to pneumoconiosis such that his report constitutes a 'medical determination of total disability due to pneumoconiosis which has been communicated to the miner'" under § 725.308 of the regulations.

Claimant filed one prior claim for benefits on August 16, 1999. The record of the prior claim does not include a medical report finding Claimant totally disabled due to pneumoconiosis. The record only includes a report from Dr. Baker; however, he found Claimant had the respiratory capacity to perform his prior coal mine employment. (DX 1-61).

In order for a medical report to constitute notice, it must be a well-reasoned opinion that Claimant was totally disabled due to pneumoconiosis. Therefore, I find that Employer has not rebutted the presumption of Section 725.308(c), and that this claim was timely filed. Furthermore, even if I had found the medical report well-reasoned, the communication element is not satisfied. The fact that the medical report of Dr. Barker is in the record, does not mean the communication requirement is satisfied. I am not inclined to assume that simply because a medical report was in the record or in the possession of Claimant's attorney, that the findings were "communicated" to Claimant. In fact, the presumption under § 725.308(c) is that every claim is timely. Assuming that access to a report equates to communication by a physician would severely undermine § 725.308(c). Furthermore, although Claimant testified at the hearing, he made no statement that Dr. Baker ever informed him that he was totally disabled due to pneumoconiosis. (Tr. 22-23). Actually Claimant testified that no physician had informed him that he was totally disabled due to pneumoconiosis. (Tr. 22-23). Accordingly, I find that that

Claimant's testimony also does not support Employer's contention that the instant claim is untimely.

Therefore, concerning timeliness, I have found that the medical report of Dr. Baker is not a well-reasoned opinion diagnosing total disability due to pneumoconiosis. In addition, I have found that no diagnosis was ever communicated to Claimant. Either of these findings is independently sufficient to defeat Employer's timeliness contention, thus, this claim was timely filed.

Threshold Issue for Subsequent Claims

Under the amended regulations of the Act, the progressive and irreversible nature of pneumoconiosis is acknowledged. 20 C.F.R. § 718.201(c). Consequently, claimants are permitted to offer recent evidence of pneumoconiosis after receiving a denial of benefits. *Id.* The new regulations provide that where a claimant files a subsequent claim more than one year after a prior claim has been finally denied, the subsequent claim must be denied on the grounds of the prior denial unless "Claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. § 725.309(d). If a claimant establishes the existence of an element previously adjudicated against him, only then must the administrative law judge consider whether all the evidence of record, including evidence submitted with the prior claim, supports a finding of entitlement to benefits. *Id.* A duplicate claim will be denied unless Claimant shows that one of the applicable conditions has changed since the date of the previous denial order. *Id; see, also Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998 (6th Cir. 1994).

Accordingly, because Claimant's previous claim was denied, he now bears the burden of proof to show that one of the applicable conditions of entitlement has changed. 20 C.F.R. § 725.309(d). I must review the evidence developed and submitted subsequent to January 2, 2001, the date of the prior denial, to determine if he meets this burden. *Id.*

The following elements were deemed not shown by Claimant as a result of the initial denial: that he had pneumoconiosis as defined by the Act and the regulations; his pneumoconiosis arose out of coal mine employment; and he is totally disabled due to pneumoconiosis. 20 C.F.R. § 410.410(b).

Medical Evidence

Medical evidence submitted with a claim for benefits under the Act is subject to the requirement that it must be in "substantial compliance" with the applicable regulations' criteria for the development of medical evidence. *See* 20 C.F.R. §§ 718.101 to 718.107. The regulations address the criteria for chest x-rays, pulmonary function tests, physician reports, arterial blood gas studies, autopsies, biopsies and "other medical evidence." *Id.* "Substantial compliance" with the applicable regulations entitles medical evidence to probative weight as valid evidence.

Secondly, medical evidence must comply with the limitations placed upon the development of medical evidence. 20 C.F.R. § 725.414. The regulations provide that a party is limited to submitting no more than two chest x-rays, two pulmonary function tests, two arterial blood gas studies, one autopsy report, one biopsy report of each biopsy and two medical reports as affirmative proof of their entitlement to benefits under the Act. §§ 725.414(a)(2)(i), 725.414(a)(3)(i). Any chest x-ray interpretations, pulmonary function test results, arterial blood gas study results, autopsy reports, biopsy reports and physician opinions that appear in one single medical report must comply individually with the evidentiary limitations. *Id.* In rebuttal to evidence propounded by an opposing party, a claimant may introduce no more than one physician's interpretation of each chest x-ray, pulmonary function test or arterial blood gas study. §§ 725.414(a)(2)(ii), 725.414(a)(3)(ii). Likewise, the District Director is subject to identical limitations on affirmative and rebuttal evidence. § 725.414(a)(3)(i-iii). Furthermore, since this is a subsequent claim only evidence submitted after January 2, 2001 will be considered unless a material change in physical condition is proven. 20 C.F.R. § 725.309(d).

A. X-ray Reports[2]

Exhibit	Date of X-ray	Physician/Qualifications	Interpretation
DX 1-59	8/03/99	Baker B-reader	1/0[3]
DX 11	6/17/02	Forehand B-reader	Completely negative
CX 1	1/07/03	Alexander BCR/B-reader	1/1
EX 1	1/07/03	Wiot BCR/B-reader	No abnormalities consistent with pneumoconiosis[4]

B. Pulmonary Function Studies[5]

[2] A chest x-ray may indicate the presence or absence of pneumoconiosis. 20 C.F.R. § 718.102(a) and (b). It is not utilized to determine whether the miner is totally disabled, unless complicated pneumoconiosis is indicated wherein the miner may be presumed to be totally disabled due to the disease.

[3] Dr. Baker performed Claimant's department sponsored pulmonary examination in the first claim. Claimant has designated Dr. Baker's August 3, 1999 x-ray as evidence in this claim; however, this x-ray was in existence before the denial of the previous claim, and cannot be considered in determining whether there has been a change in condition. *See Cline v. Westmoreland Coal Co.*, 21 B.L.R. 1-69, 1-74 (1997). If Claimant proves a material change in condition I will then reopen the record and take Dr. Baker's findings into consideration.

[4] Claimant did not file Dr. Alexander's x-ray reading within twenty days of the hearing. As a result, I granted Employer sixty days to obtain a rebuttal reading. Employer then filed three readings of this x-ray from Drs. Wiot, Jarboe and Lieber. Only Dr. Wiot's reading is admitted into evidence as Employer's Exhibit 1, because it is the reading designated as rebuttal evidence. Employer did not designate any other readings as evidence before the twenty days expired. Therefore, I cannot admit the readings by Drs. Jarboe and Lieber into evidence, otherwise I would have to give Claimant time to respond to those readings. Furthermore, with or without the additional readings the x-ray is still inconclusive because a board-certified radiologist and b-reader has found it positive and also has found it negative for pneumoconiosis.

[5] The pulmonary function study, also referred to as a ventilatory study or spirometry, indicates the presence or absence of a respiratory or pulmonary impairment. 20 C.F.R. § 718.104(c). The regulations require that this study be conducted three times to assess whether the miner exerted optimal effort among trials, but the Benefits Review Board (the "Board") has held that a ventilatory study which is accompanied by only two tracings is in substantial compliance with the quality standards at § 718.204(c)(1). *Defore v. Alabama By-Products Corp.*, 12 B.L.R. 1-27

Exhibit/ Date	Physician	Age/ Height	FEV_1	FVC	MVV	FEV_1 / FVC	Tracings	Comments
DX 11 6/17/02	Forehand	52/ 65"	3.07	4.29	83	71%	Yes	Variable cooperation and effort[6]

C. Blood Gas Studies[7]

Exhibit	Date	Physician	pCO_2	pO_2	Resting/ Exercise
DX 11	6/17/02	Forehand	35	62	R
			30	86	E

D. Narrative Medical Evidence[8]

Randolph J. Forehand, M.D. examined Claimant on June 17, 2002, at which time he took a patient history of symptoms and recorded an employment history of seventeen and a half years in underground coal mine employment. (DX 11). Dr. Forehand noted that Claimant worked as a roof bolter. He recorded a history of frequent colds (since 1998), wheezing (since 1997), arthritis (since 1996), heart disease (since 1998), high blood pressure (since 1998) and seizure disorder (since 1998). Dr. Forehand stated that Claimant smoked one pack of cigarettes per day between 1982 and 1992. Claimant's symptoms included sputum (daily), wheezing (daily, upon exertion), dyspnea (ten years), cough and non-exertional chest pain (two to three times a week). In addition, Dr. Forehand performed a chest x-ray, pulmonary function tests, arterial blood gas studies, EKG and physical examination on Claimant. He noted Claimant's chest exam revealed normal breath sounds.

After reviewing the results of the examination and tests, Dr. Forehand found no evidence of a lung disease caused by coal dust exposure. He stated that the chest x-ray was clear, the pulmonary function testing revealed a normal ventilatory pattern and the arterial blood gas studies showed no hypoxemia. Dr. Forehand opined that Claimant had no respiratory impairment. He found that Claimant is able to perform his regular coal mine employment or comparable work in a dust-free environment. (DX 11).

(1988). The values from the FEV_1 as well as the MVV or FVC must be in the record, and the highest values from the trials are used to determine the level of the miner's disability.

[6] Claimant lists on his evidence summary form that Dr. Burki validated the pulmonary function testing at Director's Exhibit 10. However, there is no such validation in the record. The claim only includes a validation of the arterial blood gas studies by Dr. Burki. (DX 11).

[7] Blood-gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. 20 C.F.R. § 718.105(a).

[8] Claimant also designated the August 31, 1999 medical report of Dr. Baker; however, this report was in existence before the denial of the previous claim, and should not be considered in determining whether there has been a change in condition. *See Cline v. Westmoreland Coal Co.*, 21 B.L.R. 1-69, 1-74 (1997).

F. Hospital and Treatment Records

The amended regulations provide that, notwithstanding the evidentiary limitations contained at 20 C.F.R. § 725.414(a)(2) and (a)(3), "any record of a miner's hospitalization for respiratory or pulmonary or related disease may be received into evidence." 20 C.F.R. § 725.414(a)(4). Furthermore, a party may submit other medical evidence reported by a physician and not specifically addressed under the regulations under Section 718.107, such as a CT scan. There are no hospital or treatment records to take into consideration.

DISCUSSION AND APPLICABLE LAW

Because Claimant filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. Under this part of the regulations, Claimant must establish by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. § 725.202(d)(2)(i-iv). Failure to establish any of these elements precludes entitlement to benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989).

Pneumoconiosis and Causation

Section 718.202 provides four means by which pneumoconiosis may be established: chest x-ray, biopsy or autopsy, presumption under §§ 718.304, 718.305 or 718.306, or if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201. 20 C.F.R. § 718.202(a). The regulatory provisions at 20 C.F.R. § 718.201 contain a definition of "pneumoconiosis" provided as follows:

> (a) For the purposes of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical," pneumoconiosis and statutory, or "legal," pneumoconiosis.
>
> (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

> (2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

§ 718.201(a).

It is within the administrative law judge's discretion to determine whether a physician's conclusions regarding pneumoconiosis are adequately supported by documentation. *Lucostic v. United States Steel Corp*., 8 B.L.R. 1-46, 1-47 (1985). "An administrative law judge may properly consider objective data offered as documentation and credit those opinions that are adequately supported by such data over those that are not." *See King v. Consolidation Coal Co*., 8 B.L.R. 1-262, 1-265 (1985).

A. X-ray Evidence

Under Section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(*en banc*); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). As noted above, I also may assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP,* 12 B.L.R. 1-6 (1988); *Clark*, 12 B.L.R. 1-149 (1989).

The chest x-rays in the record do not support a finding of pneumoconiosis. Dr. Forehand, a B-reader, found the June 17, 2002 x-ray film negative for pneumoconiosis. Dr. Alexander, a Board-certified radiologist and B-reader, found the January 7, 2003 x-ray film positive for pneumoconiosis, but Dr. Wiot, a Board-certified radiologist and B-reader, found the film negative. Therefore, I find this x-ray inconclusive. Accordingly, pneumoconiosis has not been established under § 781.202(a)(1) by a preponderance of the evidence.

B. Autopsy/Biopsy

Pursuant to Section 718.202(a)(2), a claimant may establish the existence of pneumoconiosis by biopsy or autopsy evidence. As no biopsy or autopsy evidence exists in the record, this section is inapplicable in this case.

C. Presumptions

Section 718.202(a)(3) provides that it shall be presumed that the miner is suffering from pneumoconiosis if the presumptions described in Sections 718.304, 718.305, or 718.306 are applicable. Section 718.304 is not applicable in this case because there is no evidence of complicated pneumoconiosis. Section 718.305 does not apply because it pertains only to claims

that were filed before January 1, 1982. Finally, Section 718.306 is not relevant because it is only applicable to claims of miners who died on or before March 1, 1978.

D. Medical Opinions

Section 718.202(a)(4) provides another way for a claimant to prove that he has pneumoconiosis. Under Section 718.202(a)(4), a claimant may establish the existence of the disease if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that he suffers from pneumoconiosis. Although the x-ray evidence is negative for pneumoconiosis, a physician's reasoned opinion might support the presence of the disease if it is supported by adequate rationale, notwithstanding a positive x-ray interpretation. *See Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 9 B.L.R. 1-22, 1-24 (1986). The weight given to a medical opinion will be in proportion to its well-documented and well-reasoned conclusions.

A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 B.L.R. 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984); *Buffalo v. Director*, OWCP, 6 B.L.R. 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp*., 2 B.L.R. 1-130 (1979).

A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(*en banc*).

Dr. Forehand's report concluded Claimant does not have pneumoconiosis. He found that Claimant did not have a lung disease caused by coal dust exposure. His opinions are consistent with the probative chest x-ray evidence of record. (DX 11). I find Dr. Forehand's medical report well-reasoned and well-documented regarding pneumoconiosis.

I have considered all the evidence under Section 718.202(a); and I find the probative negative x-ray report and the complete, comprehensive and supported medical opinion report of Dr. Forehand outweighs the other contrary evidence of record. Thus, I find Claimant has failed to demonstrate, by a preponderance of the evidence, the existence of pneumoconiosis.

Causation of Pneumoconiosis

Once it is determined that a claimant suffers from pneumoconiosis, it must be determined whether Claimant's pneumoconiosis arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). The burden is upon Claimant to demonstrate by a preponderance of the evidence that his/her pneumoconiosis arose out of his coal mine employment. 20 C.F.R. § 718.203(b) provides:

> If a miner who is suffering or has suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arouse out of such employment.

Id.

Since I have found that Claimant failed to prove that he has pneumoconiosis, the issue of whether pneumoconiosis arose out of his employment in the coal mines is moot.

Total Disability

The determination of the existence of a totally disabling respiratory or pulmonary impairment shall be made under the provisions of Section 718.204. A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b)(1). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 B.L.R. 1-11, 1-15 (1991). A claimant can be considered totally disabled if the irrebuttable presumption of Section 718.304 applies to his claim. If, as in this case, the irrebuttable presumption does not apply, a miner shall be considered totally disabled if in absence of contrary probative evidence, the evidence meets one of the Section 718.204(b)(2) standards for total disability. The regulation at Section 718.204(b)(2) provides the following criteria to be applied in determining total disability: 1) pulmonary function studies; 2) arterial blood gas tests; 3) a cor pulmonale diagnosis; and/or, 4) a well-reasoned and well-documented medical opinion concluding total disability. Under this section, I must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike evidence, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1987).

A. Pulmonary Function Tests

Under Section 718.204(b)(2)(i) total disability may be established with qualifying pulmonary function tests.[9] To be qualifying, the FEV_1 as well as the MVV or FVC values must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). I must determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1- 154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In assessing the reliability of a study, I may accord greater weight to the opinion of a physician who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984). Because tracings are used to determine the reliability of a ventilatory study, a study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If a study is accompanied by three tracings, then I may presume

[9]A qualifying pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(b)(2)(i) and (ii). A non-qualifying test produces results that exceed the table values.

that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984). Also, little or no weight may be accorded to a ventilatory study where the miner exhibited poor cooperation or comprehension. *See, e.g., Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984).

The June 17, 2002 pulmonary function test is the only applicable test of record. (DX 11). However, it produced non-qualifying values. Accordingly, I find per Section 178.204(b)(2)(i), Claimant has failed to establish total disability.[10]

B. Blood Gas Studies

Under Section 718.204(b)(2)(ii) total disability may be established with qualifying arterial blood gas studies. All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984). In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner or circumstances surrounding the testing affected the results of the study and, therefore, rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984) (miner suffered from several blood diseases); *Cardwell v. Circle B Coal Co.*, 6 B.L.R. 1-788 (1984) (miner was intoxicated).

The June 17, 2002 arterial blood gas studies are the only applicable studies of record. The study at rest produced qualifying results, but the test at exercise produced non-qualifying results. Accordingly, I find per Section 178.204(b)(2)(i), Claimant has failed to establish total disability by a preponderance of the evidence.

C. Cor Pulmonale

There is no medical evidence of cor pulmonale in the record, I find Claimant failed to establish total disability with medical evidence of cor pulmonale under the provisions of Section 718.204(b)(2)(iii).

D. Medical Opinions

The final way to establish a totally disabling respiratory or pulmonary impairment under Section 718.204(b)(2) is with a reasoned medical opinion. The opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. *Id*. A claimant must demonstrate that his respiratory or pulmonary condition prevents him from engaging in his "usual" coal mine employment or comparable and gainful employment.
20 C.F.R. § 718.204(b)(2)(iv).

[10] Dr. Forehand noted Claimant's cooperation and effort levels as variable. In order for a test to comply with regulation requirements a claimant must put forth a good effort and cooperation level when the test is administered. However, a non-conforming study may be entitled to probative weight where the results are non-qualifying. The Board has stated that a report's lack of cooperation and comprehension statements does not lessen the reliability of the study when it is non-qualifying. *Crapp v. U.S. Steel Corp.*, 6 B.L.R. 1-476 (1983). Dr. Forehand's test produced non-qualifying results, and therefore, I have taken it into consideration.

The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. In assessing total disability under Section 718.204(b)(2)(iv), the administrative law judge, as the fact-finder, is required to compare the exertional requirements of Claimant's usual coal mine employment with a physician's assessment of Claimant's respiratory impairment. *Budash v. Bethlehem Mines Corp.*, 9 B.L.R. 1-48, 1-51 (holding medical report need only describe either severity of impairment or physical effects imposed by claimant's respiratory impairment sufficiently for administrative law judge to infer that claimant is totally disabled). Once it is demonstrated that the miner is unable to perform his or her usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform comparable and gainful work pursuant to Section 718.204(c)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

Dr. Forehand's report is summarized above. He opined that Claimant has no pulmonary impairment. Dr. Forehand stated that Claimant has the respiratory capacity to perform his regular coal mine employment. He found that the pulmonary function testing produced a normal ventilatory pattern and the arterial blood gas studies revealed no hypoxemia. The objective testing of record supports Dr. Forehand's finding that Claimant is not totally disabled. (DX 11). Therefore, I find Dr. Forehand's opinion well-reasoned and well-documented regarding total disability. Accordingly, based on the preponderance of the evidence, I find Claimant has not established total disability by the probative medical opinion reports of record under the provisions of Subsection 718.204(b)(2)(iv).

E. Overall Total Disability Finding

Upon consideration of all of the evidence of record, Claimant has not established, by a preponderance of the evidence, total disability. Accordingly, I find Claimant has not established total disability under the provisions of Section 718.204(b).

Total disability due to Pneumoconiosis

Since I have found that Claimant failed to prove total disability, the issue of whether total disability is due to pneumoconiosis is moot.

ENTITLEMENT

In sum, the newly submitted evidence does not establish a material change in condition upon which the prior claim was denied. Claimant has not met any of the conditions of entitlement. Therefore, Mr. Harrison's claim for benefits under the Act shall be denied.

Attorney's Fees

The award of attorney's fees, under this Act, is permitted only in cases in which Claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to Claimant for the representation services rendered to him in pursuit of the claim

ORDER

IT IS HEREBY ORDERED that the claim of Donnie Harrison for benefits under the Black Lung Benefits Act is hereby DENIED.

A

JOSEPH E. KANE
Administrative Law Judge

Notice of Appeal Rights: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with Board within thirty (30) days from the date of which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* C.F.R §802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).